CITATION: Quenneville v. Volkswagen Group Canada, Inc., 2018 ONSC 2516
COURT FILE NO.: CV-15-537029CP
COURT FILE NO.: CV-15-543402CP
DATE: 20180419

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
MATTHEW ROBERT QUENNEVILLE, LUCIANO TAURO, MICHAEL JOSEPH PARE, THERESE H. GADOURY, AMY FITZGERALD, RENEE JAMES, AL-NOOR WISSANJI, JACK MASTROMATTEI, JAY MACDONALD, JOSEPH SISSINONS CHIROPRACTIC P.C., ANDREW JAMES BOWDEN, and CHRISTINA LYN VICKERY Plaintiffs	*Reidar M. Mogerman, Michael Peerless* and *Emily Assini* for the Plaintiffs
– and –	
VOLKSWAGEN GROUP CANADA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., AUDI CANADA, INC., AUDI AKTIENGESELLSCHAFT, AUDI OF AMERICA INC. and VW CREDIT CANADA, INC. Defendants	*Cheryl Woodin, Michael Eizenga* and *Ilan Ishai* for the Volkswagen/Audi Defendants *Glenn Zakaib* for the North American Porsche Defendants
AND BETWEEN:	
JUDITH ANNE BECKETT Plaintiff	
– and –	
PORSCHE CARS CANADA LTD., PORSCHE FINANCIAL SERVICES CANADA, PORSCHE CARS NORTH AMERICA, INC., and DR. ING. H.C.F. PORSCHE AKTIENGESELLSCHAFT Defendants	*David Neave* for the Porsche AG Defendant Objectors: Michael Cardiff, Jeffrey Gaskell, Matthew Giardetti, Ricky Malekar, Brian Nixon, Maxim Strombski, and Jean-Pierre Zahnar
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: April 5, 2018

PERELL, J.

REASONS FOR DECISION

A. Preamble

[1] In the case at bar, a large class of consumers are harmed by car manufacturers. Representative Plaintiffs sue for access to justice and behaviour modification. The car manufacturers have no defence on the merits, and the only issue is what remedies the Class Members should receive. With the assistance of a retired Chief Justice, the parties negotiate a settlement that requires court approval. The standard of approval is that the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class. The law is that reasonableness allows for a range of possible resolutions and that reasonableness is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation. Reasonableness does not need to approach perfect access to justice or behaviour modification, which are the primary goals of class proceedings statutes.

[2] The issue in the case at bar is whether the proposed settlement agreement known as the 3.0L Settlement Agreement is within the range of reasonableness in achieving access to justice and behaviour modification in this case of an indefensible egregious wrongdoing.

B. Introduction

[3] In a certified for settlement purposes class action under the *Class Proceedings Act, 1992,*[1] Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei, Jay MacDonald, Joseph Sissinons, Chiropractic P.C., Andrew James Bowden, and Christina Lyn Vickery (the "Quenneville Plaintiffs") sue Volkswagen Group Canada, Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America, Inc., Audi Canada, Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada, Inc.

[4] In a companion class action that has been certified for settlement purposes Judith Anne Beckett sues Porsche Cars Canada Ltd., Porsche Financial Services Canada, Porsche Cars North America, Inc., and Dr. Ing. h.c. F. Porsche Aktiengesellschaft.

[5] Three of the Quenneville Plaintiffs, namely Andrew James Bowden, Christina Lyn Vickery, and Joseph Sissinons Chiropractic P.C., and Ms. Beckett move for approval of what has been labelled the "3.0L Settlement Agreement."

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[1] S.O. 1992, c. 6.

C. Facts

1. The Litigation

[6] On September 18, 2015, the United States Environment Protection Agency ("US EPA") released a Notice of Violation stating that Volkswagen manufactured and installed "defeat devices" in certain diesel engine vehicles equipped with 2.0 litre (2.0L) engines. The defeat devices rendered inoperative elements of a vehicle's emission control system while the car was operating on the road but not when the car was being tested for emissions. The 2.0L diesel vehicles did not meet emissions standards.

[7] On November 2, 2015, the US EPA issued a second Notice of Violation and stated that Volkswagen manufactured and installed defeat devices in certain model year 2014-2016 diesel light-duty vehicles equipped with 3.0 litre (3.0L) engines, including the 2015 model year Porsche Cayenne diesel. It was subsequently announced by the US EPA that Volkswagen admitted that the defeat device was present in all its US 3.0 litre models since 2009.

[8] The US EPA announcements about the 2.0L and about the 3.0L engines caused a media storm around the world. In Canada, by November 4, 2015, Volkswagen had halted sales of all vehicles with 3.0L diesel engines and Audi Canada and Porsche Canada had halted sales of 2013-2016 vehicles with 3.0L diesel engines.

[9] The US EPA announcements prompted class actions in the United States and in Canada. By December 4, 2015, approximately 35 proposed class proceedings had been commenced across Canada. The announcements also prompted criminal proceedings and administrative proceedings against Volkswagen around the world.

[10] Shortly after the US EPA's announcements Volkswagen voluntarily offered their affected customers with 2.0L and 3.0L vehicles Owner Credit Packages worth over $100 million in compensation. These packages were without prejudice to the rights of these customers and were accepted by 80% of them. It may be noted here that the 3.0L Settlement Agreement expressly does not treat the Owner Credit Packages as a credit toward the settlement benefits described below.

[11] In Québec, "Option consommateurs," a consumer protection organization, commenced a proposed class action against Volkswagen and Audi,[2] and Frank-Fort Construction Inc. commenced a class against against Porsche with respect to the 2.0L and the 3.0L diesel vehicles.[3]

[12] On December 4, 2015, on an uncontested carriage motion, the Quenneville Plaintiffs[4] were awarded carriage of a national class action, excluding Québec-based proceedings, against the Audi and Volkswagen Defendants.

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[2] *Option consommateurs c. Volkswagen Group Canada Inc., et al.*, Court File No. 500-06-000761 (Montreal, Québec).

[3] *Frank-Fort Construction Inc. c. Porsche Cars Canada, Ltd. et al.*, Court File No. 540-06-000012-155 (Laval, Québec).

[4] *Quenneville et al. v. Volkswagen Group Canada, Inc. et al.* Court File No. CV-15-537029-00CP.

[13] Class Counsel in the Quenneville action is a consortium comprised of Strosberg Sasso Sutts LLP, Siskinds LLP, McKenzie Lake Lawyers LLP, Camp Fiorante Matthews Mogerman LLP, Koskie Minsky LLP, Rochon Genova LLP, Roy O'Connor LLP, and Branch MacMaster LLP.

[14] On December 23, 2015, the same Class Counsel from the Quenneville action filed Ms. Beckett's proposed national class proceeding against Porsche in respect of its 3.0L diesel vehicles.[5]

[15] On December 24, 2015, Class Counsel filed a Fresh Amended Statement of Claim that included claims with respect to both the 2.0L diesel and the 3.0L diesel vehicles.

[16] Class Counsel maintained a working relationship with Elizabeth Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP, who was appointed Lead Plaintiffs' Counsel and Chair of the Plaintiffs' Steering Committee in the US litigation, and with Joe Rice of Motley Rice LLC, who led the American negotiating and financial committees.

[17] On March 29, 2016, on behalf of the Quenneville action Plaintiffs, Class Counsel commenced a proposed class action against Robert Bosch GmbH. Bosch is alleged to have designed the software for the default devices installed in the diesel vehicles.

[18] On June 28, 2016, in the U.S., Volkswagen entered into an agreement to settle certain claims relating to the 2.0L diesel vehicles.

[19] In October 2016, in the U.S., the U.S. District Court—Northern District of California approved the settlement with respect to the 2.0L diesel vehicles.

[20] On December 16, 2016, an agreement to settle certain claims related to Volkswagen and Audi-brand 2.0L vehicles was reached in the Quenneville action and in the parallel Option consommateurs action in Québec.

[21] On December 20, 2016, in the U.S., Volkswagen and Porsche entered into an agreement to settle certain claims related to approximately 80,000 Volkswagen, Audi, Porsche 3.0L vehicles.

[22] In April 2017, the 2.0L Settlement Agreement was approved by the Superior Courts of Ontario and Québec and the claims program was implemented shortly thereafter.[6]

[23] On May 17, 2017, the U.S. District Court—Northern District of California approved the settlement with respect to the 3.0L diesel vehicles. Assuming a 100% take up, the settlement of the 3.0L diesel claims in the U.S. was valued at $1.2 billion.

[24] Also, on May 17, 2017, the U.S. District Court—Northern District of California approved a settlement for $327,500,000 with Robert Bosch GmbH.

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[5] *Beckett v. Porsche Cars Canada Ltd. et al.*, Court File No. CV-15-543402CP.

2. The Settlement Negotiations

[25] In Canada, Class Counsel retained Ted Stockton, Vice President and Director of Economic Services of the Fontana Group Inc. Mr. Stockton was the expert for the Steering Committee in the parallel U.S. litigation. Mr. Stockton is an economist with a specialty in the automotive industry. In Canada, Mr. Stockton was retained to evaluate the economic effects on consumers of the sale of the diesel engine vehicles in light of the deceptive marketing and sale by the Defendants. He was also retained to develop the terms of the 3.0L Settlement Agreement.

[26] On August 17, 2017, formal negotiations began with respect to the 3.0L diesel claimants. The Honourable François Rolland, the retired Chief Justice of the Superior Court of Québec, was the mediator. Settlement meetings and mediation sessions were attended by representatives of the US- and German-based Defendants and the Competition Bureau as well as the Parties' experts.

[27] The focus of the negotiations was what remedies should be available to the claimants.

[28] A factor in the negotiations was the possibility of the Defendants' bankruptcy given the criminal, administrative, and other class actions around the world against them.

[29] During the negotiations, the Defendants took the position that the situation of lessees was different from the situation of the owners of diesel vehicles. The Defendants submitted that lessees had experienced much less damage than the owner claimants and the settlement should reflect this difference.

[30] During the negotiations, on October 20, 2017 and December 18, 2017, the US EPA approved an emission modification, the Emissions Compliant Repair, for some of the defective vehicles, which are known as the Generation-2 vehicles, which pursuant to a recall will be offered in Canada free of charge. The Emissions Compliant Repair was designed to bring the vehicle into compliance with the original emissions standards without material adverse changes in vehicle reliability, durability, performance, drivability, or other driving characteristics.

[31] The approval of the Emissions Compliant Repair had a profound effect on the settlement negotiations and broke a logjam in the negotiations.

[32] The fact that Generation-2 vehicles could be restored to their original emissions standards differentiated the Generation-2 claimants from the Generation-1 claimants and constrained the remedies of the Generation-2 claimants if the action proceeded to trial in comparison to the Generation-1 owners, whose vehicle could not be made compliant. For the Generation-2 claimants, if their case proceeded to trial, they would be entitled to damages but they would not be entitled to rescission; *i.e.*, in effect, a buyback was no longer available to Generation-2 claimants.

[33] On December 21, 2017, the parties announced an agreement in principle by way of a joint press release.

[34] By Order dated December 21, 2017, Mr. Bowden, Ms. Vickery and Joseph Sissinons Chiropractic P.C. were added as party plaintiffs to the Quenneville action.

[35] On January 9, 2018, the parties signed the 3.0L Settlement Agreement.

3. Details of the 3.0L Settlement Agreement

[36] It is estimated that there are 4,932 affected Generation-1 vehicles (4,770 owned and 162 leased). It is estimated that there are 14,876 affected Generation-2 vehicles (10,571 owned and 4,305 leased).

[37] To understand the terms of the 3.0L Settlement Agreement, it is necessary to understand that for what are described as Generation-2 vehicles, there is an approved repair, the Emissions Compliant Repair, that is accompanied by an Extended Emissions Warranty.

[38] In other words, the US EPA has approved an engine modification that makes the emissions control systems of the Generation-2 vehicles compliant with emissions standards. In contrast, the Generation-1 vehicles cannot be repaired to be brought into compliance with the emissions standards originally set for the vehicles.

[39] Although the Objectors are sceptical that the goal of the Emissions Compliant Repair was or will be achieved, the intent of the repair is to achieve compliance with emissions standards without materially reducing the performance of the vehicle.

[40] Some of the details of the 3.0L Settlement Agreement are set out below:

- There is a Claims Administrator, a third-party appointed by the court (RicePoint Administration Inc.) to administer and oversee the Claims Program including making eligibility and benefits decisions.
- There is an Arbitrator (The Honourable François Rolland) to resolve appeals from the decisions of the Claims Administrator.
- There is a list of Generation-1 and Generation-2 vehicles.
- The criteria for eligibility establishes four class of claimants; namely: (1) **Eligible Owner**, owner of eligible vehicle on November 2, 2015 who continues to own the vehicle; (2) **Eligible Seller,** owner of eligible vehicle on November 2, 2015 who sold the vehicle before January 17, 2018; (3) **Eligible Purchaser**, purchaser of eligible vehicle after November 2, 2015 who continues to own the vehicle; and (4) **Eligible Lessee,** lessee of an eligible vehicle from VW Credit Canada, Inc. or Porsche Financial Services Canada on November 2, 2015.
- There is a different package of benefits with respect to Generation-1 and Generation-2 vehicles.
- The settlement benefits are net of legal fees and administration expenses. There is no deduction for benefits received by claimants from the Defendants before the settlement.
- Assuming a 100% take-up, the value of the 3.0L Settlement Agreement is $290.5 million.
- The Settlement Agreement preserves the Class Members' claims against Robert Bosch GmbH.

Generation-1

- The settlement covers the following Generation-1 vehicles: Audi Q7, 2009-2012 and VW Touareg, 2009-2012.

- Under the 3.0L Settlement Agreement, depending on their classification, the Generation-1 claimants are offered: (a) damages payment; (b) buyback; (c) buyback with trade-in; (d) reduced emissions repair, if available, and repair payment; (e) early lease termination; and (f) reimbursement of unused warranties.
- Damages Payment:
    - Eligible Owners receive an Owner Damages Payment ranging from $8,875 to $12,600 depending on the vehicle type. Certain Eligible Owners may also receive reimbursement of extended vehicle warranties or service plans if they chose either buyback option.
    - Eligible Sellers receive a Non-Owner Damages Payment ranging from $4,437.50 to $6,300 depending on the vehicle type.
    - Eligible Purchasers receive a Non-Owner Damages Payment ranging from $4,437.50 to $6,300 or from $2,218.75 to $3,150 depending on the vehicle type and on whether the vehicle was under lease from VW Credit Canada or from a third-party on November 2, 2015.
    - Eligible Lessees receive a Non-Owner Damages Payment ranging from $4,437.50 to $6,300 or from $2,218.75 to $3,150 depending on the vehicle type and on whether the lease was terminated, transferred, or active or if the vehicle was purchased or sold.
- Under the 3.0L Settlement Agreement, the Generation-1 Eligible Owners have the option of the Buyback Option; *i.e.*, selling their vehicle to Volkswagen in exchange for vehicle value.
    - Vehicle Value is the vehicle's Canadian Black Book, Inc. wholesale value on November 2, 2015 based upon the applicable Black Book Condition Category.
    - The vehicle will be valued as at November 2, 2015 based on its mileage on the date the vehicle is surrendered. The only inspection is to determine that the vehicle is operable and has not been intentionally damaged or stripped of its original parts.
- Under the 3.0L Settlement Agreement, the Generation-1 Eligible Owners have the option of the Buyback with Trade-In Option of selling their vehicle to Volkswagen in exchange for vehicle value being applied toward the purchase price of a new Volkswagen or Audi vehicle or any used Volkswagen Group brand vehicle.
    - For the Buyback with Trade-In, claimants will have all or a portion of their vehicle's Fair Market Value at the time of the Trade-In applied towards the purchase price of a new or a used Volkswagen or Audi vehicle, and will receive a takeaway payment that is equal to the Owner Damages Payment plus the difference between Vehicle Value and the Market Value used for the trade-in.
- The buyback options use the value of the vehicle as on November 2015 notwithstanding that the buyback is not exercised until later. The buyback may be implemented up until August 31, 2019.

- Under the 3.0L Settlement Agreement, the Generation-1, Eligible Lessees have the option of Early Lease Termination, which allows the lessee to terminate the leases before the end of the lease periods without early termination penalties.
- Under the 3.0L Settlement Agreement, the Generation-1 Eligible Owner Claimants are offered: (a) emissions compliant repair, if available, and (b) repair payments. The repair payments are as set out in the following chart:

Model	**2009**	**2010**	**2011**	**2012**
VW Touareg	$8,875	$9,500	$9,775	$10,450
Audi Q7	$9,350	$9,850	$10,575	$12,600

- Under the 3.0L Settlement Agreement, The Generation-1 Eligible Sellers, Eligible Purchasers, and Eligible Lessees are offered: (a) emissions compliant repair, if available, and (b) repair payments of 50% of the applicable Eligible Owner Repair Payments.
- In the event that no Reduced Emissions Modification becomes available for Generation-1 Eligible Vehicles by September 14, 2018, then: (a) certain Eligible Owners will be entitled to Loan Forgiveness benefits; and (b) all remaining eligible claimants will be extended a second right to opt out.
- It was Mr. Stockton's opinion that under the 3.0L Settlement Agreement, collectively, Generation-1 claimants would receive payments in excess of aggregate retail replacement cost of their vehicles as at September 2015 before consideration of the sales tax credit and the indirect benefit associated with the mileage credit.
- It was Mr. Stockton's opinion that the Buyback and Buyback with Trade-In along with the Owner Damages Payments provided Eligible Owners with compensation sufficient to support repurchase of comparable vehicles (based on consumers' actual vehicle values) at retail value as of September 2015; *i.e.,* the date the 2.0L diesel allegations became public.

Generation-2:

- The settlement covers the following Generation-2 vehicles: Audi A6, 2014-2016, Audi A7, 2014-2016, Audi A8/A8L, 2014-2016, Audi Q5, 2014-2016, Audi Q7, 2013-2015 , Porsche Cayenne, 2013-2016, and VW Touareg, 2013-2016. There are approximately 15,000 Generation-2 claimants.
- Repair Payment:
    - Eligible Claimants must receive the Emissions Compliant Repair to receive the Repair Payment and Extended Emissions Warranty.
    - Eligible Owners receive an Owner Repair Payment ranging between $6,525 and $11,025, depending on type of vehicle. The repair payments are as set out in the following chart:

Make, Model	2013	2014	2015	2016
Audi A6		$7,525	$8,125	$8,725
Audi A7		$8,425	$9,025	$9,725
Audi A8, A8L		$9,950	$10,225	$11,025
Audi Q5		$7,325	$7,500	$7,700
Audi Q7	$7,025	$7,625	$7,925	
Porsche Cayenne	$7,875	$8,525	$9,125	$9,325
VW Touareg	$6,525	$7,025	$7,525	$7,775

  - Eligible Sellers receive a Non-Owner Repair Payment ranging between $3,262.50 and $5,512.50, depending on type of vehicle.
  - Eligible Purchasers receive a Non-Owner Repair Payment or 50% of the Leased Vehicle Repair Payment, depending on the type of vehicle and whether the vehicle was previously under lease from VW Credit Canada, Inc. or Porsche Financial Services Canada, Inc. to a third-party as of November 2, 2015.
  - Eligible Lessees receive a Leased Vehicle Repair Payment of $2,000 or 50% of the Leased Vehicle Repair Payment, depending on the type of vehicle and whether the lease has ended/transferred or remains active, or if the vehicle has been purchased and continues to be owned or was sold.

- Mr. Stockton opined that the Repair Payment in the aggregate exceeded more than 11% of the original MSRP (manufacturer's suggested retail price) for all owned Generation-2 vehicles.
- The 3.0L Settlement Agreement provides that, in the event the Emissions Compliant Repair results in: (a) a reduction in calculated fuel economy using the US EPA formula of more than 3 miles per gallon (MPG); (b) a decrease of greater than 5% in peak horsepower; or (c) a decrease of greater than 5% torque ("Reduced Performance"), Volkswagen will pay an additional payment of $500 for each affected Generation-2 Eligible Vehicle.
- In the event the Emissions Compliant Repair causes substantial, material adverse degradation above and beyond the Reduced Performance levels, the 3.0L Settlement Agreement reserves the rights of the Plaintiffs and affected 3.0L Settlement Class Members to seek additional remedies from the courts.

Honorarium

- Section 12.2 of the 3.0L Settlement Agreement provides that a reasonable honorarium not exceeding $15,000 may be paid on consent, subject to court approval, by the Defendants to the four Settlement Class Representatives (excluding Option consommateurs), in addition to the benefits payable to the Settlement Class under the Settlement Agreement.

4. Response to the Proposed Settlement

[41] On January 12, 2018, a Consent Agreement between Audi Canada, Inc., Porsche Cars Canada Ltd. and Volkswagen Group Canada, Inc. and the Commissioner of Competition was filed with the Competition Tribunal pursuant to which the Defendants agreed to pay fines of $2.5 million.

[42] On January 12, 2018, the Quenneville action and the Beckett action were certified for settlement purposes. Similar orders were made by the Superior Court of Québec in the parallel Québec proceedings.

[43] The actions were certified for the following common issue:

> Did software installed in Volkswagen, Audi and Porsche 3.0L diesel engine vehicles allow those vehicles to operate one way when recognizing driving cycles in NOx emissions laboratory testing and in a different way when the vehicles were in on-road operation and did National Settlement Class members suffer any damages as a result of such conduct?

[44] The certification for settlement purposes was for the following class:

> Persons (including individuals and entities), except for Excluded Persons, and persons included in the Option consommateurs Settlement Class and the Frank-Fort Settlement Class who:
>
> (a) on November 2, 2015, were owners or lessees of, or in the case of Non-Authorized Dealers, held title to or held by bill of sale dated on or before November 2, 2015, an Eligible Vehicle; or,
>
> (b) after November 2, 2015, but before the Claims Submission Deadline, become owners of, or, in the case of Non-Authorized Dealers, hold title to or hold by bill of sale dated after November 2, 2015, an Eligible Vehicle and continue to be the owners as at the Purchaser Transaction Date.

[45] The Settlement Class does not include the claims of what I will describe as excluded putative class members. The excluded putative class members are: (a) persons who sold their affected vehicles before November 2, 2015; (b) persons with affected vehicles which were not originally sold or leased in Canada; and, (c) persons with affected vehicles which were leased from a leasing company other than VW Credit Canada Inc. or Porsche Financial Services Canada. Because these persons are not included in the 3.0L Settlement Agreement, it is necessary to give them notice that the original class action is being discontinued insofar as their claims are concerned but they retain all their rights against the Defendants. I am advised that these persons are or could be members of other class actions.[7]

[46] The 3.0L Settlement Agreement is supported by: (a) the Representative Plaintiffs; (b) the

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[7] Volkswagen has advised that it anticipates opening the U.S. claims process to certain owners of eligible 3.0L Volkswagen, Audi and Porsche diesel vehicles that were purchased in the U.S. but are ineligible to participate in the U.S. Settlement because their vehicle was registered in Canada from September 18, 2015 through January 31, 2017, if the 3.0L Settlement Agreement is approved.

plaintiffs in the Related Actions commenced across Canada by counsel who are part of the larger Class Counsel group, whose Related Actions will be stayed or dismissed if the 3.0L Settlement Agreement is approved; (c) Option consommateurs, which is a consumer advocacy association and representative plaintiff in the Québec Option consommateurs Action against Volkswagen and Audi; (d) Frank-Fort Construction Inc., the Representative Plaintiff in the action against Porsche in Québec; (e) the Competition Bureau, which publicly endorsed the 3.0L Settlement Agreement by press release; and (f) Class Counsel in these actions and Counsel in the Option consommateurs Action and the Frank-Fort Action in Québec.

[47] Court-approved notice to putative Settlement Class Members was provided by RicePoint Administration Inc. in accordance with the approved Notice Program.

[48] Between January 12, 2018 and March 28, 2018, the 3.0L Settlement Agreement Website had been visited 106,024 times and RicePoint had received and responded to over 3,787 phone inquiries.

[49] Class Counsel was aware of a Facebook Group that was formed early on after the 3.0L diesel allegations were made public. Class Counsel provided two webinars for Facebook Group participants, regularly invited members of the Facebook Group by Facebook posts, to contact Class Counsel with their questions, and engaged in numerous Facebook Group-related communications.

[50] RicePoint received four invalid opt out requests. RicePoint received 30 valid opt out requests which represents 0.15% of estimated Settlement Class Members, four in respect of Generation-1 vehicles and 26 in respect of Generation-2 vehicles. Twenty-six of the opt outs were from putative Settlement Class Members outside of Québec.

[51] RicePoint received 81 valid objection forms. There were many different types of objections. Some objectors raised issues that would affect a substantial number of Class Members, some objectors had idiosyncratic complaints and some objectors raised issues that would affect a small number of Class Members. The main general objections were of six types; namely:

> (1) general settlement opposition; *i.e.* Class Members who submit that the 3.0L Settlement Agreement does not satisfy the criterion for settlement under the *Class Proceedings Act, 1992* and that if fails to achieve access to justice and behaviour modification, especially in light of the egregious misconduct of the Defendants;
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> (2) comparison objections; *i.e.*, Class Members who contend that the 3.0L Settlement Agreement compares unfavourably to the U.S. settlement;
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> (3) eligibility objections; *i.e.,* Class Members who do not satisfy eligibility criteria or who object to how they would be classified;
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> (4) monetary objections; *i.e.*, Class Members objecting to the amount of the monetary benefits provided by the 3.0L Settlement Agreement;
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> (5) buyback objections; *i.e.,* Generation-1 Class Members objecting to the amount of the buyback amounts; and,

(6) emissions repair objections; *i.e.*, Generation-2 Class Members concerned about effects of the repair on their vehicle.

[52] Over half of the Objectors were Generation-2 Claimants who were concerned that the emissions repair would damage and/or diminish their vehicle because of: loss of horsepower and torque; engine noise; diminished towing ability; the removal of the downhill braking feature with attendant deterioration of braking systems; diminished mileage and increased fuel costs; changed shift patterns with attendant increased engine wear and fuel consumption; and increase in AdBlue/DEF [engine additives] consumption.

D. Discussion

1. Settlement Approval

[53] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> *Notice: dismissal, discontinuance, abandonment or settlement*
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[54] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[8]

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[8] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.); *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[55] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[9]

[56] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[10] An objective and rational assessment of the pros and cons of the settlement is required.[11]

[57] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[12] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[13]

[58] The test for a discontinuance is different than the test for settlement approval. Before giving approval of discontinuance, the court must be satisfied that the interests of the putative class will not be prejudiced.[14] A motion for discontinuance should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose, whether there is a viable replacement party so that putative class members are not prejudiced or whether the defendant will be prejudiced.[15]

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[9] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[10] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

[11] *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

[12] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

[13] *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.); *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.).

[14] *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39 and [2004] O.J. No. 2775 (S.C.J.); *Sollen v. Pfizer*, [2008] O.J. No. 4787 (C.A.), aff'g [2008] O.J. No. 866 (S.C.J.); *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (S.C.J.) at paras. 14-29; *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 7137.

[15] *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

2. The Objections

[59] Putting the objections aside, in my opinion, the 3.0L Settlement Agreement satisfies the test for approval of a class action settlement and the test for an approval of a discontinuance. The claims for an honorarium are also appropriate.

[60] The 3.0L Settlement Agreement is not a perfect settlement, but given: the law about what remedies are available; how the law of remedies differently impacts Generation-1 and Generation-2 claimants; the reality that the alternative of a certification motion, a trial, and individual damages assessment involve a protracted duration of litigation that would at best produce a marginally better settlement; the general support for the 3.0L Settlement Agreement; the circumstance of hard and informed bargaining; and the involvement of a knowledgeable and skilled mediator, it is a good settlement, at least until the Objectors' views are considered. The question then is have the Objectors identified problems or flaws that make the Settlement Agreement unfair and unreasonable for the Class Members?

[61] I was very impressed by and appreciative of the Objectors who submitted objections and those that appeared at the settlement approval hearing. Those that spoke at the hearing were extremely intelligent, and notwithstanding their lack of legal training, they were formidable advocates for the Class Members. The Objectors who spoke at the hearing spoke eloquently and with passion but most importantly they presented logical and well-reasoned arguments as to why the settlement should be rejected. The Objectors were genuine advocates for the Class Members seeking to achieve adequate compensation for them. I took the Objectors' arguments very seriously.

[62] As set above, the main objections of the Objectors were of six types. It can be said of all these objections that they were meaningful and substantive objections that deserve very serious consideration.

[63] An aspect of the Objectors' strong arguments is that unlike most settlements of class actions or indeed settlements of litigation in general, there was little reason to discount substantive access to justice and the need to achieve behaviour modification through a settlement. Notwithstanding the Defendants' routine denial of liability, the case at bar is a case where the reasonableness of the settlement should be measured by comparing the settlement outcome with what could be achieved by the class assuming an optimum recovery at trial but keeping in mind that even a successful trial is many years away and if this action returns to the litigation track, the next event is not the trial but the certification motion.

[64] It appears that the settlement negotiations that led to the 3.0L Settlement Agreement were driven by these imperatives, and it was lucky for the Defendants that at the eleventh hour of the negotiations, a repair was approved for the Generation-2 vehicles. The availability of the Emissions Compliant Repair was the Defendants' strongest bargaining chip and explains why it is fair and reasonable to confine the buyback remedies to the Generation-1 vehicles and not make buyback remedies available to Generation-2 claimants.

[65] Thus, the Objectors' general settlement opposition, comparison objections, eligibility objections, monetary objections, buyback objections, and emissions repair objections, while meaningful, do not rise to the level of making the settlement unfair and unreasonable even in this case where the case for liability is so strong and the misconduct of the Defendants so

reprehensible. Viewed objectively, the settlement is well within the range of reasonableness and having regard to the other measures or factors that the court will consider on a settlement approval motion, I am satisfied that the 3.0L Settlement Agreement should be approved.

[66] That said, I have a particular observation about the "eligibility opposition" insofar as it concerns Eligible Lessees. The observation, and it is not a finding, is that for some Objectors there may already be an answer to their objection; *i.e.*, their concerns may already be addressed by the 3.0L Settlement Agreement. In other words, the 3.0L Settlement Agreement does not need to be rejected or amended to address their concern.

[67] To explain this observation, it should be noted that the Objectors' precise argument is that some – but not necessarily all - Eligible Lessees should be classified as Eligible Owners because in their particular circumstances, the leasing of the vehicle was the equivalent of a conditional sale and purchaser; *i.e.*, the lease was a just a means of financing a purchase of the vehicle.

[68] Class Counsels' response to this argument was set out in paragraph 136 of their factum, as follows:

> 136. Lastly, the assertion that persons who leased vehicles as a financing option and who intended, from the outset, to purchase their vehicles at the lease end should be considered "Owners" is problematic because it injects a subjectivity component to the assessment of claims. Further, even persons who had an intention to purchase their vehicles from the outset were not obligated to complete the transaction at lease end. The obligations and risk assumed by those persons was different than that assumed from an outright owner, and attempting to determine intent in the context of a settlement administration is very problematic.

[69] In my opinion, this is a weak response and there is a better one. To be more precise, there are objective criteria for differentiating a lease from a conditional sale, and the real problem is how to characterize a lease with an option to purchase, which under the 3.0L Settlement Agreement is classified as a lease.

[70] The problem with characterizing a lease as categorically a lease is that only if the lessee has no right or option to purchase the vehicle is the lease a true lease. If a lessee must purchase the vehicle at the end of the lease, then the lease is a conditional sale. If the lessee of a vehicle has an option to purchase, then it can be said that to the degree that the option is illusory in the sense that, practically speaking, the lessee will or should or must exercise the option to purchase, then the lease is a conditional sale and not a true lease.

[71] Thus, for example, to use the example of one of the Objectors. He disproportionately prepaid his lease payments, drove the vehicle so as to incur a financial penalty should he return the vehicle and not purchase it, and he was persuaded to extend his lease and to purchase extended warranties, all of which acts strongly suggest or demonstrate that he always intended to purchase the vehicle and the leasing was equivalent to a conditional sale with title to pass when a transfer of ownership was completed. This Objector could objectively prove that, practically speaking, his lease was a purchase.

[72] For this Objector, and similarly situated lessees, it appears to me that it is arguable that the answer to their objection is already within the 3.0L Settlement Agreement. If this argument is correct then under the 3.0L Settlement Agreement, they may apply to be treated as Eligible Owners. It should be left to the Claims Administrator and the Arbitrator to decide how they

should be classified based on the idiosyncratic evidence they provide to substantiate their claim that their particular lease in their particular circumstances was a financing device for ownership. While most cases of leases with an option to purchase will be classified as leases and not purchases, there may be some cases where the Claims Administrator will be satisfied to accept the claim as being a claim by an Eligible Owner. If the Claims Administrator is not satisfied, then it may reclassify the claim and treat the claim as a claim made by an Eligible Lessee.

[73] In any event, like the other objections, the "eligibility opposition" does not take the 3.0L Settlement Agreement outside the zone of reasonableness and I am otherwise satisfied that the agreement meets the test for approval.

E. Conclusion

[74] For the above reasons, I approve the 3.0L Settlement Agreement and the discontinuance of claims subject to approval of an appropriate notice to the Settlement Class Members.

Perell, J.

Released: April 19, 2018

CITATION: Quenneville v. Volkswagen Group Canada, Inc., 2018 ONSC 2516
COURT FILE NO.: CV-15-537029CP
COURT FILE NO.: CV-15-543402CP
DATE: 20180419

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MATTHEW ROBERT QUENNEVILLE, LUCIANO TAURO, MICHAEL JOSEPH PARE, THERESE H. GADOURY, AMY FITZGERALD, RENEE JAMES, AL-NOOR WISSANJI, JACK MASTROMATTEI, JAY MACDONALD, JOSEPH SISSINONS CHIROPRACTIC P.C., ANDREW JAMES BOWDEN, and CHRISTINA LYN VICKERY

Plaintiffs

– and –

VOLKSWAGEN GROUP CANADA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., AUDI CANADA, INC., AUDI AKTIENGESELLSCHAFT, AUDI OF AMERICA INC. and VW CREDIT CANADA, INC.

Defendants

AND BETWEEN:

JUDITH ANNE BECKETT

Plaintiff

- and -

PORSCHE CARS CANADA LTD., PORSCHE FINANCIAL SERVICES CANADA, PORSCHE CARS NORTH AMERICA, INC., and DR. ING. H.C.F. PORSCHE AKTIENGESELLSCHAFT

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 19, 2018